Supreme Court, U.S.
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No. 01 494

IN THE

Supreme Court of the United States

JAY SEGAL,

Petitioner,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was it error for the Court of Appeals to refuse to follow and apply state law (as required by the Constitution, federal statutes and this Court) in upholding summary judgment (a) in a manner inconsistent with exercise of the judicial power under Article III of the Constitution, and (b) depriving petitioner of his constitutional right to jury trial (7th Amendment) and due process of law (5th Amendment)?

2. Was it error for the Court of Appeals to uphold summary judgment by doing the following:

a. selectively ignore facts in the record in order to uphold summary judgment,

b. misstate facts in the record in order to avoid application of a state statute regulating insurance, and

c. ignore applicable state law in order to reach a decision in direct contradiction of California law regulating insurance?

3. Was certification of the central legal issue in the case to the California Supreme Court necessary for a fair and authoritative ruling in a circumstance where the Court of Appeals chose to ignore applicable California state law?

4. Was it error for the court to prohibit amendment of the complaint by refusing to follow this Court's decisional law relating to Federal Rules of Civil Procedure, Rule 59(e) and 15(a)?

PARTIES

The Petitioner is Jay Segal ("Segal").

The Respondent is Massachusetts Mutual Life Insurance Company ("Mass Mutual").

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PETITION FOR A WRIT OF CERTIORARI

Segal respectfully submits that a writ of certiorari should issue to review the decision by the United States Court of Appeal for the Ninth Circuit upholding summary judgment in favor of Mass Mutual and denial of Segal's request to amend in order to "save the complaint," as such decisions, both in substance and in the manner in which they were made, constituted error and violated Article III and the 5th and 7th Amendments to the United States Constitution.

OPINIONS BELOW

The Order of the Court of Appeals denying Segal's Petition for Rehearing and Suggestion, in the Alternative, for Rehearing *En Banc*, is reprinted in the Appendix ("App.") at 1a.

The Memorandum Decision of the Court of Appeals denying Segal's appeal from the District Court judgment, and related orders, in favor of Mass Mutual, is reprinted at App. 2a.

The Order of the District Court denying Segal's Motion for Partial Summary Judgment and granting Mass Mutual's Motion for Summary Judgment is reprinted at App. 5a.

The Order of the District Court denying, in relevant part, Segal's Motion to Amend the Complaint is reprinted at App. 16a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit's Order denying Segal's Petition for Rehearing and Suggestion, In the Alternative, for Rehearing *En Banc*, was filed June 25, 2001. This petition is timely filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves the statutes and rules reprinted at App. 21a to 35a, as follows:

U. S. Const. Article III, 5th and 7th Amendments
15 U.S.C. § 1012(a)
28 U.S.C. §§ 1254(1), 1652
FRCP, Rule 8, 11, 15(a), 50, 56(c), (e), 59(a), (e).
Cal. Ins. Code §§ 10320, 10321, 10390
Cal. Rules of Court, Rule 29.5

STATEMENT OF THE CASE

A. Introduction

Segal sued Mass Mutual for breach of contract and insurance bad faith under California law based on Mass

Mutual's failure to pay disability insurance benefits to Segal under a policy issued by Mass Mutual. Jurisdiction in the district court was based upon diversity of citizenship, and as the insurance policy was delivered in California and the benefits were to be paid in California, California state law applied. In addition, the McCarran-Ferguson Act, mandated that state law be applied.[1]

Segal petitions this Court because, in direct contradiction of this Court's decisional law, the courts below, in denying Segal's motion for summary adjudication and granting Mass Mutual's motion for summary judgment, selectively ignored the facts and applicable law, misstated facts, and refused to certify the central legal issue relating to California law to the California Supreme Court. Also, in direct contradiction of this Court's decisional law, the court refused to allow Segal to amend his complaint in order to "save the complaint," relief Segal sought as a direct result of the court's ruling on the motion for summary judgment.

The court's actions deprived Segal of his 7th Amendment right to present his case to a jury under applicable California law regulating insurance as mandated by this Court, by the McCarran-Ferguson Act and by California law which directly supported his case on the merits. The court's actions in derogation of state law are so flagrant as to implicate Article III of the U. S. Constitution (judicial power) and the 5th Amendment (due process).

B. Factual Background

Mass Mutual issued a disability income policy to Segal, effective April 21, 1992. The policy provided that it was considered "in force" as long as it was not terminated. In

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[1] 15 U.S.C. § 1012(a) provides that "(t)he business of insurance and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

addition, the policy provided benefits for "recurrent disabilities," as follows:

> A period of disability due to the same cause or related cause as that of an earlier period of disability may be considered to be a continuation of the earlier period. This depends on how much time has passed from the end of the earlier period to the date the current period of disability began. If less than six months have passed, we will consider it to be a continuation of the earlier period for the purpose of measuring the Waiting Period and the Maximum Benefit Period. If six months or more have passed, we will consider it to be a new period of disability.

The policy also contained a "conformity with state statutes" provision which provided automatic amendment of any policy term that failed to meet the minimum requirements of California insurance statutes.

Segal became disabled on or about June 28, 1995 due to a back condition, and he filed a claim for disability benefits which was approved by Mass Mutual. Mass Mutual, after a sixty-day elimination period provided in the policy, paid Segal benefits commencing August 26, 1995, and continuing through November 30, 1995 (when Segal felt his disability had resolved). On or about March 21, 1996, Segal, on the advice and with the assistance of a Mass Mutual agent, "changed" the disability benefit on the policy to $2,600 per month and a maximum benefit period of two years going forward. However, on or about May 22, 1996, less than six months after Segal's "earlier period" of disability ended, Segal's disability due to his back condition recurred, by definition a "recurrent disability" as defined in the policy. As such, Segal's disability was considered under the terms of the policy to be continuous and a "continuation of the earlier period" of disability for purpose of measuring ". . .the Waiting Period and the Maximum Benefit Period."

Mass Mutual confirmed, in a letter August 28, 1996, that Segal's disability was a recurrent disability and a continuation of the period of disability that commenced June 28, 1995. Consistent with the terms of the policy before any changes, Segal's disability benefit payments were reinstated retroactively from the date of recurrence, May 22, 1996, at the same benefit amount and for the same Maximum Benefit Period as was in place when his disability first started in June 1995.

Mass Mutual continued benefit payments in that fashion until July 8, 1997, when Mass Mutual unilaterally informed Segal that they had changed their position and would pay Segal only $2,600 a month to May 22, 1998, two years total from May 22, 1996. As a result, Mass Mutual would avoid approximately $600,000 in future disability benefit payments to Segal.

C. Proceedings Below

Segal filed his complaint in the United States District Court for the Eastern District of California on July 1, 1998. Mass Mutual answered the complaint on or about October 9, 1998.

Segal filed a motion for partial summary judgment on February 25, 1999. Mass Mutual filed a counter motion for summary judgment on March 29, 1999. On July 14, 1999, the district court issued its order denying Segal's motion and granting Mass Mutual's motion, upon which the court entered judgment. Eight days later, on July 22, 1999, Segal filed a motion to alter or amend judgment solely to permit the filing of an amended complaint in order to save the complaint, for which Segal sought leave. The district court denied the motion to amend on September 16, 1999.

Segal timely filed his notice of appeal in the Ninth Circuit of Appeals on September 29, 1999. The court of appeals, in an unpublished decision, affirmed the district court's orders and judgment by memorandum decision March 23, 2001.

Segal filed a petition for rehearing and suggestion, in the alternative, for rehearing *en banc* April 6, 2001. The Ninth Circuit Court of Appeals denied the petition for rehearing and rejected the suggestion for rehearing *en banc* by order June 25, 2001.

REASONS THE PETITION SHOULD BE GRANTED

I. THE DECISION BELOW DEPRIVES SEGAL OF IMPORTANT LEGAL PROTECTIONS AFFORDED HIM BY THE CONSTITUTION AND BY STATE LAW REGULATING THE BUSINESS OF INSURANCE, WHICH THE COURT OF APPEAL REFUSED TO FOLLOW.

A. The Court ignored key facts.

The issue—whether Segal was entitled to "recurrent disability" benefits under California law—turned on a number of key facts in the record that the court ignored, as follows:

The recurrent disability benefit in Segal's disability policy in effect when he became disabled was a benefit of $3,010 to age 65 (April 21, 2015) that Segal had fully paid for through payment of premiums to Mass Mutual prior to onset of his disability. From that date forward all premiums on the policy were waived by Mass Mutual due to Segal's disability in accordance with the terms of the policy, and the premium waiver remained in effect through all relevant times referred to in the proceedings below and continuing today.

The court held, contrary to the facts, that Segal agreed to replace his policy. When Segal made changes in his policy, it was accomplished by an application form that expressly stated "*NO*" in response to the question "Will any insurance now being applied for replace or change, or is it intended to replace or change, any insurance or annuity in whole or in part, issued by this (Mass Mutual) or any other company?"

The application form for the policy amendment expressly noted that Mass Mutual Policy No. 9457234, effective from April 21, 1992, was in force at the time.

The application form for policy amendment also expressly noted that Segal had just come off a claim for disability with Mass Mutual as of November 30, 1995, less than six months before the date of the application.

Further, the application form for the amendment expressly provided that the "liability of (the) company" on the new insurance or changes in insurance would only take effect after the changes were approved and premium was paid based on the new changes, from and after February 13, 1996, the date of the application for amendment. The original policy was not canceled, rescinded, or replaced, and the policy number remained the same. Therefore, the policy changes occurred to an in force policy that was previously issued and remained in force, not a new or different insurance policy.

The changes Segal made in the policy were pursuant to a "Right To Change The Plan" provision of the insurance policy in Part 6, "Policy Rights," which by its terms set forth rights that could be exercised by the insured, Segal, for his benefit, not a limitation or exclusion to be asserted by Mass Mutual for its benefit.

California Insurance Code § 10390 provides that any insurance policy delivered or issued in California must be construed as provided in the California Insurance Code, and when any provision in a disability insurance policy is in conflict with any applicable provision of the code the rights, duties and obligations of the insurer and the insured shall be governed by the insurance code provisions. In that regard, California Insurance Code § 10320(h) and 10321 expressly provides that disability policies shall not be amended, changed, limited, altered or restricted by any means other than rider upon a separate piece of paper.

The policy expressly provided that the Maximum Benefit Period (to age 65—April 21, 2015) would continue even if that period extended beyond expiration of the policy. Therefore, once a period of disability began continuation of payment of disability benefits for that disability up to the Maximum Benefit Period did not depend on the policy even being in force.

None of these key facts supporting Segal's right to disability benefits were noted or discussed by the district court or the Ninth Circuit Court of Appeals in reaching their decision, which, as discussed below, was contrary to the facts and California law.

B. The Court misstated key facts.

In addition to ignoring the key facts noted above, the court misstated a number of key facts. The court characterized the amendment of Segal's in force policy as a "reissuance" of the subject policy back to its original issue date when, in fact, the changes occurred to an in force insurance policy that had previously been issued and remained in force with the same policy number, not a new or different insurance policy. Further, there is no such thing as a "reissue" of a disability insurance policy under California law, and none was ever cited by the parties or by the court. Likewise, Mass Mutual did not void the originally issued policy nor did it recalculate and return premiums to Segal for the prior period of coverage from April 21, 1992, date of issue, to March 21, 1996, the claimed effective date of policy changes, to account for the substantial reduction in either monthly benefit payment levels, $3,010 compared to $2,600, or for a reduction of the potential Maximum Benefit Period (from age 65 to 24 months).

The court also erroneously stated, without any factual support, that Segal intentionally elected to abandon his recurrent disability rights for which he had paid premium up

to the onset of the single period of disability, which by the terms of the policy and by law commenced in June 1995 before any changes to the policy.

The court did correctly acknowledge that the recurrent disability provision takes into account an earlier disability period (ending less than six months earlier) with respect to calculation of certain time periods. However, the court incorrectly stated that the recurrent disability provision did not fix the applicable benefit period for a "recurrent disability," which by the terms of the policy had to be considered as a single period, not two separate periods, of disability. Given the fact that termination of the policy would not have affected Segal's rights in any event, a change in the benefit level or maximum benefit period going forward, which might be applicable to a new and different disability period, had no effect on Segal's recurrent disability benefit in effect when his single period of disability started before policy changes, a fact acknowledged by Mass Mutual in 1996 before it changed its mind in 1997.

In the context of ruling on a summary judgment, the court also overlooked and never discussed the factual conflict presented by Mass Mutual at first confirming that Segal was entitled to recurrent disability benefits under the terms in effect when his disability began and then taking exactly the opposite position a year later in order to benefit itself to the tune of $600,000. In other words, the conflict between Mass Mutual's own positions creates a factual conflict about the company's intent, its credibility and its custom and practice which could not be resolved by summary judgment.

The courts below could not properly have ruled on Mass Mutual's motion for summary judgment as a matter of law as it presented genuine issues of material fact. Instead, the courts ignored facts and misstated facts, and essentially tried and resolved factual controversies which deprived Segal of his right to jury trial on factual issues and in direct

contradiction of this court's holdings on summary judgment procedures under Federal Rules of Civil Procedure, Rule 56(c) in *Celotex Corp. v. Catrett,* 477 U.S. 317, 322,106 S.Ct. 2548, 2552 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S. Ct. 2505, 2510 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-586, 106 S.Ct. 1348, 1355 (1986).

C. The Court ignored state law.

The federal courts below were required to apply the substantive law of the State of California in this diversity case. *Erie R. Co. v. Thompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822 (1938). State law provides the rules of decisions in civil actions in courts of the United States in cases where they apply, except where the Constitution, treaties or federal statutes provide otherwise. 28 U.S.C. §1652.

The Court of Appeal was required to review *de novo* the district court's determinations of state law. *Salve Regina College v. Russell*, 499 U.S. 225, 231-232, 111 S.Ct. 1217, 1221 (1991). The decisional law of this Court contemplates that in fulfilling that duty the Court of Appeal would engage in careful analysis with adequate reflection and discussion sufficient to produce "learned and impressive opinions." 499 U.S. at 232-233, 111 S.Ct. at 1121-1122. In the present case, the Court of Appeals did nothing of the sort, instead producing an unpublished memorandum shockingly devoid of analysis or accuracy.

The duty of the Court of Appeals was to ascertain and apply existing California law, not to change the law. *See e.g., Klingebiel v. Lockeed Aircraft Corp.*, 494 F.2d 345, 346 (9th Cir. 1974). In addition, the decisions of California's intermediate courts of appeal were to be followed where the Supreme Court of California had not spoken on the question in the absence of convincing evidence that the highest court of the state would decide differently. *Klinegebiel v. Lockeed*

Aircraft Corp., supra, at 347 fn.2, citing *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 467, 61 S.Ct. 336, 338 (1940).

The proper function of the federal courts is to ascertain what the state law is, not what it ought to be. *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 497, 61 S.Ct. 1020, 1022 (1941). The Court of Appeal was required to ascertain from all available data what the state law was and to follow it unless it was convinced by other persuasive data that the California Supreme Court would have decided otherwise. *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236-237, 61 S.Ct. 179, 183-184 (1940); *Six Companies of California v. Joint Highway Dist. No. 13, etc.*, 311 U.S. 180, 188, 61 S.Ct. 186, 188 (1940); *Fidelity Union Trust Co., et al v. Field*, 311 U.S. 169, 177, 61 S.Ct. 176, 178 (1941). In the present case, the Court of Appeal, without any of the meaningful, let alone learned, analysis required by this Court's mandates ignored the applicable California law.

In addition to ignoring the applicable provisions of the California Insurance Code, Sections 10320(h), 10321 and 10390, and Mass Mutual's own conformity with state law provision in the policy, as discussed above, the Court of Appeals ignored and refused to apply California common law which expressly holds that a disabled person's entitlement to disability benefits survives interruption by temporary periods of recovery or temporary return to employment; this is so even if a policy does not have an applicable "recurrent disability" provision and even if the policy was terminated after initial onset of the disability. *See e.g., Wilden v. Washington Nat. Ins. Co.*, 18 Cal.3d 631, 135 Cal.Rptr. 69; *Schilk v. Benefit Trust Life Ins. Co.*, 273 Cal.App.2d 302, 78 Cal.Rptr. 60 (1969), *Joyce v. United Insurance Company*, 202 Cal.App.2d 654, 21 Cal.Rptr. 361 (1962) and *McMackin v. Great American Reserve Insurance Company*, 22 Cal.App.3d 428, 99 Cal.Rptr. 227 (1971).

In *Willden v. Washington Nat. Ins. Co., supra*, the California Supreme Court adopted the rationale of prior holdings in *Schilk v. Benefit Trust Life Ins. Co., supra*, and *Frenzer v. Mutual Ben. H. & A. Assn.* (1938) 27 Cal.App.2d 406, 413, 81 P.2d 197, and held as follows:

> The "process of nature" rule holds that, within the meaning of policy provisions requiring disability within a specified time after the accident, the onset of disability relates back to the time of the accident itself whenever the disability arises directly from the accident "within such time as the process of nature consumes in bringing the person affected to a state of total (disability)." 18 Cal.3d at 635 (citations omitted).

In *Schilk v. Benefit Trust Life Ins. Co., supra*, the court held an insured was entitled to receive disability benefits even though the full totally disabling effect of injuries which prevented him from working did not become fully manifest and stable until after a 20-day period provided in the policy. 273 Cal.App.2d at 307.

In *Joyce v. United Insurance Company, supra*, consistent with the vesting effect of the "process of nature" rule, the court held that futile attempts to return to work, ostensibly interrupting temporarily a state of disability, do not establish lack of continuous disability; in other words, futile attempts to return to work temporarily do not interrupt a period of continuous disability. 202 Cal.App.2d at 665. Further, once the period of disability starts, the *Joyce* court held, even termination of the policy for non-payment of premium does not operate as a condition subsequent to terminate liability attaching while the policy was in force. 202 Cal.App.2d at 667.

In *McMackin v. Great American Reserve Insurance Company, supra*, the disability insurance policy contained a "Recurrent Disability" provision, but it only applied by its

terms to disability due to sickness; it did not apply by its terms to disability due to injury. In *McMackin* the defendant insurer contended that after the plaintiff in that case initially suffered a period of total disability due to accident he resumed employment at full salary. The insurer argued that this situation, in combination with the fact that there was no "Recurrent Disability due to accident" provision in the policy, resulted in a cessation of liability of the insurer for disability benefit payments. 22 Cal.App.3d at 437. The court in *McMackin* rejected such an interpretation by the insurer as it was contrary to California law. 22 Cal.App.3d at 437-438, citing *Erreca v. Western States Life Ins. Co.*, 19 Cal.2d 388, 397, 121 P.2d 689 (1942); *Brooks v. Metropolitan Life Ins. Co.*, 27 Cal.2d 305, 309-310, 163 P.2d 689 (1945); and *Joyce v. United Ins. Co., supra.*

When seen against this background of long-established California statutory and common law, the Court of Appeals' memorandum must be viewed as an intentional and superficial failure to follow and apply California law in deciding against Segal.

D. The Court refused to certify state law questions to the California Supreme Court.

Segal requested that the Ninth Circuit Court of Appeals certify the questions of law concerning California "recurrent disability" insurance benefits and California Insurance Code §§ 10320, 10321 and 10390 to the California Supreme Court pursuant to the procedure provided by California Rules of Court, Rule 29.5, for that purpose, especially in view of the fact that the Court of Appeals was choosing, in a diversity case, to ignore and not discuss or apply the applicable California law. The Court of Appeals refused. As a result, in a diversity case in which California law was required to be applied, and in which the California law was state law regulating insurance mandated by the McCarran-Ferguson Act, Segal was deprived of his rights under applicable state

law by federal courts that chose, without reasoned explanation, to turn a blind eye to it.

While normally a federal court's certification of a controlling issue of law to the California Supreme Court is discretionary—*See e.g., Lehman Bros. v. Schein*, 416 U.S. 386, 94 S.Ct. 1741 (1974)—the present case involves abuse of that discretion. Certification is intended to provide litigants with assurance of gaining an authoritative ruling on a dispositive state law issue. 416 U.S. at 390-391. Here, the Court of Appeals ignored and refused to follow established state law and, in an unpublished memorandum, failed to analyze or even discuss why it chose to do so. Under these circumstances, an abuse of discretion occurred in the form of a court of appeal refusing to perform the judicial functions mandated by the Constitution, federal statutes and this Court.

The Circuit Courts of Appeal were originally created by Congress in 1891 (Evarts or Circuit Court of Appeals Act of March 3, 1891, 26 Stats. 826) with the intent that in diversity cases the Courts of Appeal would be considered equal in dignity to the Supreme Courts of the several States in respect to diversity cases. This intent was in furtherance of relieving this Court of appellate burdens created by diversity cases. As evidenced by this petition, the practices followed by the Courts of Appeal have certainly changed; there could be no confusing the decision below with one that would be rendered on the record in this case by the California Supreme Court, which would thoughtfully analyze, follow and accurately apply state law.

This Court should take the opportunity presented by this case to identify an abuse of discretion about which there is presently no guiding authority—the failure of a Court of Appeals to certify a controlling state law issue to a state court in a circumstance where the Court of Appeals has jurisdiction, but refuses, without legal justification, to acknowledge or apply existing state law as required by law.

II. THE DECISION BELOW DEPRIVED SEGAL OF HIS RIGHT TO "SAVE THE COMPLAINT" AS PROVIDED BY DECISIONAL LAW OF THIS COURT WHICH THE COURT OF APPEAL REFUSED TO FOLLOW.

This Court has held that allowing amendment of a complaint is a proper ground to alter or amend a judgment pursuant to Federal Rules of Civil Procedure, Rule 59(e), and in that context, pursuant to Rule 15(a), leave to amend should be freely given when justice so requires. *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962); see also *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996).

An amendment of the complaint that relates to and can "save the complaint" should be granted. *See Edwards v. Occidental Chemical Corp.,* 892 F.2d 1442, 1446 (9th Cir. 1990) (amendment including the addition of a new defendant permissible); and *Percy v. San Francisco General Hospital*, 841 F.2d 975, 978-979 (9th Cir. 1998) (amendment asserting new claim permissible).

In addition, leave to amend should be granted after the granting of a motion to dismiss a complaint where facts exist which could support filing of a new complaint. *See Sidebotham v. W. L. Robison*, 216 F.2d 816, 825 (9th Cir. 1954). Amendment of the complaint has been allowed even after trial. *See e.g., Gilbane Bldg. Co. v. Federal Reserve Bank*, 80 F.3d 895, 900 (4th Cir. 1996).

The Court of Appeal ruled that a Rule 15(a) motion to amend a complaint after judgment could only be considered if the judgment was first reopened under Rule 59 or 60, but erroneously ruled that Segal failed to demonstrate a legitimate reason to reopen the judgment, citing *Lindauer v. Rogers*, 91 F.3d 1355, 1356 (9th Cir. 1996) and *School Dist. No. 1J v. AC and S, Inc.*, 5 F.3d 1255, 1262-63 (9th Cir. 1993).

In addition to the fact that this Court had already directed, in *Foman v. Davis, supra*, that allowing amendment of a complaint is a proper ground to alter or amend judgment pursuant to Rule 59(e), and that leave to amend should be freely given, Segal did follow the holding in *Lindauer*. *Lindauer* involved a circumstance where a plaintiff erroneously moved for a new trial under Rule 59(a). The District Court elected to treat it as a motion brought under Rule 59(e) to alter or amend judgment. *Lindauer* noted that the 9th Circuit previously held in *Jarvis v. Reagan,* 833 F.2d 149 (9th Cir. 1987) only that where a final judgment is entered following the dismissal of an action, a plaintiff no longer has a right to amend as a matter of course, but rather must obtain leave of court. 91 F.3d at 1357. All *Lindauer* said in that regard is that the proper procedure is for the court to rule on the Rule 59 motion first before considering the Rule 15(a) motion to amend. *Ibid.* In *Lindauer*, the problem was that the proposed amended complaint did not contain the cause of action that was asserted as a ground to alter or amend the judgment. *Ibid.* That is not the situation presented by Segal, who followed the procedures set forth in *Lindauer* by filing a motion to alter or amend pursuant to Rule 59(e) for the express and sole purpose of allowing the filing of an amended complaint on causes of action that were not the subject of the motion for summary judgment. Segal's action had not been dismissed and the judgment filed pursuant to the summary judgment had not become final. Segal was not trying to litigate the summary judgment or cure a defect in regard to the summary judgment in the amended complaint.

Likewise, *School Dist. No. 1J v. A C and S, Inc.* did not apply to Segal's request. In *School Dist.* the plaintiff filed a motion to reconsider a motion for summary judgment on its merits under Rule 59(e) in an attempt to cure its earlier failure to comply with Rule 56(e)'s attachment requirement. The *School Dist.* case did not establish the requirements for reconsidering the motion for summary judgment on the

merits, and no Rule 15(a) motion was involved in the case nor was altering or amending the judgment for the purpose of filing an amended complaint involved.

While FRCP, Rule 8 provides that relief in the alternative may be claimed, Rule 8 does not require that alternative claims shall or must be pled. In the present case, Segal filed a complaint asserting a right to benefits under a contract (insurance policy). The District Court ruled, erroneously, that the contract which Segal sought to enforce no longer existed, but rather was replaced by a new contract with retroactive effect. Based on that ruling on a motion for summary judgment, the District Court issued its order and entered judgment. Segal sought to amend in a timely fashion before notice of appeal was due and before the judgment became final. Based directly on the District Court's ruling on summary judgment to the effect that there was a new and different contract, which Segal disputed, Segal's proposed amended complaint set forth claims for professional negligence, negligent misrepresentation, estoppel, reinstatement and reformation, which arose from the same set of operative facts, transactions and occurrences as those of the original complaint. These claims allowed Segal to save his complaint consistent with the District Court's ruling on the summary judgment and was not an attempt to relitigate the same issues.[2]

By the court's unduly rigid reasoning, Segal, and every litigant, would have to anticipate that the court would not follow and apply existing law, and plead at the outset an endless series of contradictory facts and allegations to account for every hypothetical potentiality, both logical and illogical. Notice pleading, by this ruling, would be turned

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[2] Segal separately filed a request to certify the District Court's ruling on the summary judgment for interlocutory appeal in conjunction with and following the filing of the amended complaint; this request was rendered moot by the court's refusal to allow amendment.

into pleading of the absurd where plaintiffs would be expected to essentially to plead both that black is white and white is black knowing that they did not believe half of what they pled to be true. For instance, in Segal's case, he would have to initially plead that a particular insurance policy was the contract, but alternatively that it is not the contract, that he had only one period of disability and that at the same time he had two periods of disability, that he intended only to amend his policy, not replace it and that he did not intend to amend the policy but rather abandon it, etc... In this regard, FRCP Rule 8 provides that "all statements shall be made subject to the obligations set forth in Rule 11." Rule 11, in turn, requires that allegations be truthful and supportable, and imposes sanctions for violations. Nothing in the federal rules or case law supports imposition of such a "Catch 22" on claimants as that contemplated by the courts below.

There was no valid reason for the court to deny Segal's request to amend his complaint in order to save the complaint and litigate his case on the merits in accordance with the court's prior ruling. This Court should apply its decisional law and consistent Ninth Circuit decisional law and grant Segal the requested leave to amend, in the alternative.

III. THE DECISION BELOW DENIED SEGAL DUE PROCESS OF LAW.

The memorandum disposition by the Court of Appeals is also an unfortunate example of the potential consequence of a growing and controversial trend involving the proliferation of unpublished opinions in the circuit courts of appeal. See Borger and Oldfather, *Anastasoff v. United States* and the Debate Over Unpublished Opinions, 36 Tort & Insurance Law Journal, No. 4, pg. 899-915 (American Bar Association, Summer 2001). One of the major criticisms of this practice is that the knowledge that an opinion will not be published and not citable under circuit rules results in less care being given in the writing of the opinion. *Ibid,* at 903.

This concern has been confirmed, and underscored, in a surprisingly candid article by Ninth Circuit Court of Appeals Judges Alex Kozinski and Stephen Reinhardt entitled "Please Don't Cite This!" published in the *California Lawyer* (June 2000, at p. 43), and cited by Borger and Oldfather. The judges state that unpublished memorandum decisions, known in the circuit as "memdispos," are often prepared in just a few hours, that the phrasing is given relatively little scrutiny, that concurrences and dissents are rare, that memdispos are seldom reviewed *en banc*, and that "most are drafted by law clerks with relatively few edits from judges."

Confidence in the fairness, competence and authoritativeness of the judicial process is directly impacted by results of this type, and this is no small problem. Utilization of unpublished memoranda by the courts of appeal started in the 1960's, grew to roughly half of all federal appellate opinions by 1979, and has now reached a startling 80 percent. *Ibid*, at 901.

While the judges insist in their article that care is taken to assure that results are correct, the assurance, considered in the face of the practices described, is not convincing. This is especially so in Segal's case; the errors documented in this petition support a conclusion that Segal has been relegated to second-class litigation status and denied the due process to which a decision of this type, affecting a person's right to 18 years of disability insurance benefits under state law enacted for his protection, is entitled.

This Court should take the opportunity presented by this case to address the substantive error resulting from the Court of Appeals' actions, which may be vulnerable to another criticism levelled against unpublished opinions—sweeping difficulties with an opinion under the rug by ordering it not published. Borger and Oldfather, *supra,* at 904. Mindful of the judiciary's widespread acceptance of unpublished memoranda, Segal's petition to this Court is not a procedural

attack on unpublished opinions *per se*, as objectionable to litigants as they may be, but rather includes this additional request for this Court to review the Court of Appeals' decision to determine whether it comports with the requirements of fairness and due process. Inherent in the fulfillment of the judicial power and due process is "decisional accuracy" resulting from thoughtful, unhurried decisions, essential qualities lacking in this case. *Salve Regina College v. Russell, supra* at 232.

CONCLUSION

For the reasons set forth herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Ninth Circuit and, ultimately, to vacate and reverse the memorandum decision below and remand the matter to the District Court for further proceedings on Segal's complaint; or, in the alternative, to order certification to the California Supreme Court of the question of applicability of the relevant California state law to Segal's insurance claims; or, in the alternative, to allow Segal to amend his complaint as requested.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed June 25, 2001]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-17182

JAY SEGAL,
Plaintiff-Appellant,

v.

MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,
Defendant-Appellee.

DC NO. CV-98-01264-GEB/PAN
(Eastern District of California)

ORDER

Before: HAWKINS, MCKEOWN, and WARDLAW, *Circuit Judges.*

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing *en banc.*

The full court has been advised of the suggestion for rehearing *en banc* and no active judge has requested a vote on whether to rehear the matter *en banc.* Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing *en banc* is rejected.

APPENDIX B

[Filed Mar. 23, 1999]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-17182

JAY SEGAL,
Plaintiff-Appellant,

v.

MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,
Defendant-Appellee,

DC No. CV-98-01264-GEB/PAN
Eastern California (San Francisco)

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Submitted March 15, 2001**
San Francisco, California

MEMORANDUM *

** The panel finds this case appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a)(2).

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: HAWKINS, MCKEOWN, and WARDLAW, *Circuit Judges*.

Correctly concluding that no material issues of fact remained for trial, the district court properly granted summary judgment to Massachusetts Mutual Life Insurance Company ("Mass Mutual"). The district court correctly interpreted the unambiguous terms of the policy. The recurrent disability provision takes into account the earlier disability period with respect to the calculation of certain time periods, but did not forever establish the applicable benefit payment amount or the applicable benefit period for that recurrent injury. Pursuant to the terms of the policy, the amount of benefits and the benefit period could be changed at the insured's election, as they were in this case, and this intervening change was effective at the time Segal's disability recurred. As Mass Mutual effectively reissued the disability policy in its entirety, Cal. Ins. Code § 10321, which applies to changes "after issuance," is inapplicable. The district court also properly concluded that the modified policy was not an unenforceable exclusion of existing benefits without notice, but simply a change of benefits at the insured's specific request.

Segal has waived his argument that the district court abused its discretion by considering the declarations of two Mass Mutual employees because Segal does not explain in his brief to this court how the district court erred or cite any authority to support his argument. Fed. R. App. P. 28(a)(9)(A); *Northwest Acceptance Corp. v. Lynwood Equip., Inc.*, 841 F.2d 918, 924 (9th Cir. 1988).

Finally, the district court did not abuse its discretion in denying Segal's motion to amend judgment and permit amendment of his complaint. A Rule 15(a) motion to amend a complaint after judgment may be considered "only if the judgment is first reopened under Rule 59 or 60." *Lindauer v. Rogers*, 91 F.3d 1355, 1356 (9th Cir. 1996). Segal failed to

demonstrate a legitimate reason to reopen the judgment, and the court therefore properly denied his motion. *See School Dist. No. 1J v. AcandS. Inc.*, 5 F.3d 1255, 1262-63 (9th Cir. 1993).

AFFIRMED.

APPENDIX C

[Filed Jul. 14, 1999]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. Civ. S-98-1264 GEB PAN

JAY SEGAL,

Plaintiff,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Defendants.

ORDER*

Plaintiff moves for partial summary judgment on his breach of contract claim. Defendant Massachusetts Mutual Life Insurance Company ("Mass Mutual") cross moves for summary judgment on Plaintiff's entire Complaint. For the reasons stated below, Plaintiff's motion is denied and Mass Mutual's motion is granted.

I

BACKGROUND

On April 21, 1992, Mass Mutual issued Plaintiff a policy of disability insurance. *See* Decl. of Michael Foran ("Foran Decl."), Exh. A at 3-4. For an annual premium of $2,106.36, this policy entitled Plaintiff to a basic disability monthly income of $2,600.00, as well as benefits under an "Annual

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* This case was determined to be suitable for decision without oral argument. L.R. 78-230(h).

Increase Rider" and a "Regular Occupation Rider" in the event Plaintiff became disabled while the policy was in force. *See id.* The specified "Maximum Benefit Period" under the policy was "to Expiration Date, But Not Less Than 2 Years." *See id.*

On or about June 28, 1995, Plaintiff became disabled and thereafter submitted a claim for disability benefits. *See* Pl.'s Undisputed Material Fact ("UMF") 15-16; Decl. of Robert Klupa ("Klupa Decl."), ¶ 2. After the applicable 60-day waiting period under the policy had passed, Mass Mutual began paying Plaintiff monthly disability benefits of $3,010.00 and continued making these payments until November 30, 1995, at which time Plaintiff represented that he had completely recovered. *See* Pl.'s UMF at 17-18; Klupa Decl., ¶ 2. Plaintiff later received a "Recovery Benefit" under the policy after he submitted to Mass Mutual his doctor's signed certification stating that Plaintiff "no longer has an incapacity due to sickness or injury and has been able to be actively at work for 30 days." Klupa Decl., ¶¶ 7-8 & Exhs. 5-6.

In February 1996, Plaintiff submitted an application to modify the policy. *See* Foran Decl., Exh. B. Plaintiff requested that the "Maximum Benefit Period" in the original policy be changed to two years and the basic monthly coverage be reduced to $2,600.00, effective March 21, 1996. *See id.* at 3. In April 1996, Plaintiff further requested, in writing, elimination of the "Annual Increase Rider" and "Regular Occupation Rider" from the policy. *See* Foran Decl., Exh. C. Mass Mutual accepted these modifications, and Plaintiff's premium was accordingly reduced to $735.38 per year. *See* Foran Decl., Exh. D & Exh. E. at 3.

On May 22, 1996, Plaintiff again became disabled, *see* Pl.'s UMF 21, and submitted a claim for disability benefits in June 1996, *see* Klupa Decl., ¶ 10. Mass Mutual waived the waiting period and paid Plaintiff $3,010.00 per month until

July 1997, at which time Mass Mutual began paying Plaintiff $2,600 per month. *See* Pl.'s UMF 22, 24-25; Klupa Decl., ¶ 11 and Exh. 7. Mass Mutual paid Plaintiff $2,600.00 monthly until May 22, 1998. *See* Pl.'s UMF 29.

On July 1, 1998, Plaintiff filed this action, alleging that Mass Mutual breached the insurance contract as well as its duty of good faith and fair dealing by reducing Plaintiff's benefit payments from $3,010.00 to $2,600.00 in July 1997 and by ceasing payments altogether on May 22, 1998.

II

STANDARD OF REVIEW

One of the principal purposes of the summary judgment procedure is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Therefore, summary judgment is appropriate where the record shows an absence of a genuine issue of material fact entitling the movant to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 322.

The movant has the initial burden of establishing the absence of genuine issues of material fact. Fed. R. Civ. P. 56(c). Once the movant has met its burden, the nonmovant must make a sufficient showing on matters on which it will have the burden of going forward with evidence at trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 585-87 (1986). "The inquiry involved in ruling on a motion for summary judgment. . .necessarily implicates the substantive evidentary standard of proof that would apply at the trial on the merits." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Thus, "[o]n cross motions for summary judgment, the burdens faced by the opposing parties vary with the burden of proof they will face at trial." *Cabo Distributing Co., Inc. v. Brady*, 821 F.Supp. 601, 607 (N.D. Cal. 1992).

When cross motions for summary judgment are filed, the ordinary implication is that no disputed issues of material fact exist and that the dispute may be decided as a matter of law. *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1417 n.1 (9th Cir. 1986). Nevertheless, the Court must determine whether the parties have raised issues of material fact that make summary judgment inappropriate. *Id.*

> A "material" fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or defense. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.

T. W. Electrical Service, Inc. v. Pacific Electrical Contractors, Ass'n. 809 F.2d 626, 630 (9th Cir. 1987).

III

DISCUSSION

A. Breach of Contract Claim

Both parties argue that they are entitled to summary judgment on Plaintiff's breach of contract claim. Plaintiff argues that because he "again became disabled from back pain," his disability was a "Recurrent Disability," entitling him to payments under the original policy, prior to the modifications. Pl.'s Opening Br. at 4. Mass Mutual argues that because the policy in force at the time of Plaintiff's "subsequent disability (May 22, 1996)" was the modified policy, Plaintiff was only entitled to the benefits he in fact received—monthly payments of $2,600.00 for a "Maximum Benefit Period" of two years. Def.'s Opening Br. at 6.

Because the contracts were "made in California" and jurisdiction is based on diversity of citizenship, California substantive law governs this action. *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 654 (9th Cir. 1984). The California

Supreme Court has repeatedly stated that "[w]hile insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." *Foster-Gardner, Inc. v. National Union Fire Ins. Co. of Pittsburgh*, 18 Cal. 4th 857, 868 (1998) (quoting *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992)). "So, also, the modification of a contract of insurance is governed by the rules which are applicable to contracts generally and the same elements essential to the validity of the original contract are essential to a modification thereof." *American Bldg. Maintenance Co. v. Indemnity Ins. Co. of No. America*, 214 Cal. 608, 615 (1932).

The dispute here turns on whether the original policy or the modified policy was in force at the time of Plaintiff's May 22, 1996, disability. "In force" is defined by both policies to mean that "the insurance has not terminated." Foran Decl., Exh. A at 2 & Exh. E at 2. The evidence shows that in February 1996 and again in April 1996, Plaintiff requested modifications to the terms of the original policy. *See* Foran Decl., Exhs. B & C. The evidence further shows that a "Right to the Change Plan" provision in the original policy expressly permitted these changes and defined the effect such changes would have. *See* Foran Decl., Exh. A at 17. Specifically, the "Right to Change the Plan" provision provides that "while this policy is in force, the Waiting Period or the Maximum Benefit Period, or both, may be changed" and that "[a]ll the rights, benefits and premiums after the change will be as if the change had been in effect from the Policy Date." *Id.* Mass Mutual agreed to Plaintiff's requested modifications and reduced Plaintiff's premium payment accordingly. *See* Foran Decl., Exh. D. Since the modifications became effective as of March 21, 1996, the modified policy superseded the original policy on that date, and Plaintiff's insurance under the original policy terminated

at that time. Consequently, at the time of Plaintiff's disability on May 22, 1996, the modified policy and not the original policy was in force.

Plaintiff argues that the modifications are void as a matter of law for the following reasons: (1) the modifications violate California law, *see* Pl.'s Opening Br. at 9; (2) the modifications are unenforceable because they effectively operate to limit or exclude "existing benefits" without proper notice of this effect, *see id.* at 13; and (3) Plaintiff's "disability commencing June 1995 and continuing thereafter is a single period of disability deemed by law to be uninterrupted for purposes of entitlement to disability benefits," *id.* at 11.[1] For the following reasons, these arguments are unavailing.

1. The Modifications Do Not Violate California Law

Plaintiff's reliance on California Insurance Code sections 10113, 10321, 10328 and 10291.5(b)(7)(B)(ii) to argue that the modifications are void is misplaced. Examination of these code sections reveals that the modifications to the original policy were effected in conformity with statutory requirements. First, as required by section 10113, the modified policy contained all the terms and conditions of the contract, including the modifications Plaintiff himself had

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[1] Plaintiff also argues that ambiguities in the policy should be interpreted to permit Plaintiff's receipt of benefits under the original policy. *See* Pl.'s Opening Br. at 16. However, Plaintiff fails to substantiate this argument by identifying any language in either the original policy or the modified policy that is allegedly ambiguous. "A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal4th 1, 18 (1995). Therefore, it is axiomatic that Plaintiff must identify the allegedly ambiguous language before he can argue that the ambiguity should be resolved in his favor. Since Plaintiff does not do this, his argument fails.

requested.[2] *See* Foran Decl., Exh. E. Second, in accordance with section 10321, Plaintiff's requested modifications were written on separate pieces of paper.[3] *See* Foran Decl., Exh. B at 3, Exh. C Exh. D. Third, Plaintiff's attempt to characterize section 10328 as a prohibition against modifications to disability insurance policies that the insured, in hindsight, might determine to be less favorable than terms under the original contract is unsupported by that code section.[4] Section 10328 merely prohibits provisions that would diminish the favorable effect to the insured of required provisions relating to incontestability, notice of claims, cancellation, etc. *See* Cal. Ins. Code § 10350 et seq. (Article 4) & §10369.1 et seq. (Article 5). Nothing in section 10328 prohibits the modifications here, which reduced the monthly benefit payment and the "Maximum Benefit Period" and eliminated the "Annual Increase Rider" and "Regular Occupation Rider" in exchange for a lower premium than Plaintiff had paid under the original contract. Fourth, in light of the undisputed fact that Mass Mutual paid Plaintiff full benefits under the original contract for the entire period of his disability until Plaintiff himself represented that he had completely recovered in November 1995, *see* Pl.'s UMF 15-18, Plaintiff's argument that the modifications "deprive

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[2] Section 10113 provides, in pertinent part, that "[e]very policy of []disability . . . insurance issued or delivered within this State . . . shall contain and be deemed to constitute the entire contract between the parties . . . ."

[3] Section 10321 provides that "[a]fter issuance a disability policy shall not be amended, changed, limited, altered, or restricted by any means other than rider upon a separate piece of paper."

[4] Section 10328 provides that "[n]o policy provision which is not subject to Article 4a or 5a (renumbered as Article 4 (§ 10350 et seq.) and Article 5 (§ 10369.1 et seq.) respectively) of this chapter shall make a policy or any portion thereof less favorable in any respect to the insured or the beneficiary than the provisions thereof which are subject to such articles."

[Plaintiff] of the 'real economic value' of the 'amount of benefit, length of time of benefit (and) nature or extent of benefit' for which he paid premiums from April 1992 until he became disabled," *see* Pl.'s Opening Br. at 10, is untenable, and nothing in section 10291.5(b)(7)(B)(ii) alters this conclusion. [5]

2. The Modifications Do Not Operate as Exclusions or Limitations on "Existing Benefits"

Likewise, Plaintiff's argument that the modifications operate as an exclusion or limitation to "existing benefits" and are void for lack of proper notice as to their effect misses the mark. The modifications resulted in a modified policy which superseded the original policy; therefore, the modifications do not and cannot operate as either exclusions or limitations to no longer extant benefits.

3. The Fact That Plaintiff's Disability Is Deemed to Be Recurrent Does Not Entitle Plaintiff to Benefits Under the Superseded Contract

Finally, Plaintiff's argument that the recurrence of his disability essentially revived benefits under the superseded original policy is misguided. *See* Pl.'s Opening Br. at 11. Since Plaintiff's disability recurred within six months of the end of the earlier period of disability, Mass Mutual correctly waived the waiting period under the "Recurrent Disabilities" provision in the modified policy and began making benefit payments to Plaintiff immediately. [6] However, under the

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[5] Section 10291.5(b)(7)(B)(ii) states that the California Insurance Commissioner "shall not approve any disability policy for insurance" that is of "inadequate economic value," which is determined by considering, *inter alia*, the "[a]mount of benefit, length of time of benefit, nature or extent of benefit, or any combination of those factors.

[6] In pertinent part, the "Recurrent Disabilities" provision in the modified policy provides the following:

governing policy in force at the time of the recurrence of Plaintiff's disability on May 22, 1996, Plaintiff was entitled only to monthly payments of $2,600.00 for a maximum period of two years. *See* Foran Decl., Exh. D & Exh. E at 3. The undisputed evidence shows that Mass Mutual paid Plaintiff $3,010.00 per month from May 22, 1996, until July 1997, and $2,600.00 thereafter until May 22, 1998.[7] *See* Pl.'s UMF 22, 24-25, 29. Therefore, Mass Mutual discharged its obligation to provide Plaintiff benefits under the modified policy.

In sum, Mass Mutual fulfilled its obligations to Plaintiff under both the original and modified policies. Accordingly, Mass Mutual is granted summary judgment on Plaintiff's breach of contract claim.

B. Breach of the Duty of Good Faith and Fair Dealing

Mass Mutual argues that it is entitled to summary judgment on Plaintiff's entire Complaint because "[t]here is no triable issue of fact which would entitle plaintiff to the relief sought in his lawsuit." Def.'s Opening Br. at 22. Plaintiff premises his claim for breach of the duty of good faith and fair dealing on Mass Mutual's failure to pay Plaintiff benefits under the superseded original policy. *See* Pl.'s Compl., ¶ 21. "The

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A period of disability due to the same cause or a related cause as that of an earlier period of disability may be considered to be a continuation of the earlier period. This depends on how much time has passed from the end of the earlier period to the date the current period of disability began. If less than six months have passed, we will consider it to be a continuation of the earlier period for the purpose of measuring the Waiting Period and the Maximum Benefit Period. Foran Decl., Exh. E at 7.

[7] Although Plaintiff argues that Mass Mutual's monthly payments of $3,010.00 until July 1997 were "ongoing reinstated benefits" under the original policy, *see* Pl.'s Opening Br. at 5, Mass Mutual produced evidence showing that these payments were overpayments that resulted from clerical error. *See* Klupa Decl., ¶ 10 & Exh. 7.

covenant of good faith and fair dealing is implied in law to assure that a contracting party refrains from doing anything to injure the right of the other to receive the benefits of the agreement." *Love v. Fire Ins. Exchange*, 221 Cal.App.3d 1136, 1153 (1990) (internal quotation marks omitted). Thus, to establish a breach of this implied duty, Plaintiff must show, at a minimum, that (1) Mass Mutual withheld benefits due under the policy and (2) Mass Mutual's reason for withholding benefits was "unreasonable or without proper cause." *Id.* at 1151. Plaintiff has not and cannot make either showing because Plaintiff is not entitled to benefits that he did not receive under the superseded original policy. Accordingly, Mass Mutual is granted summary judgment on Plaintiff's cause of action for breach of the duty of good faith and fair dealing. *See id.* at n. 10 ("[A]bsent an actual 'withholding' of benefits due, there is no breach of contract and likewise no breach of the insurer's implied covenant.") (citation omitted).

IV

CONCLUSION

For the foregoing reasons, Mass Mutual is granted summary judgment on Plaintiff's Complaint. [8]

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[8] Mass Mutual also moves separately to strike the declarations of Plaintiff's counsel, Douglas deVries ("deVries"), filed on or about February 19, 1999, and April 2, 1999, "on the grounds that "both declarations fail to comply with Federal Rules of Civil Procedure, Rule 56(e) since they are based upon hearsay, lack foundation, and lack personal knowledge." Def.'s Mot. to Strike Decls. at 1. Specifically, Mass Mutual objects to deVries's attempt to authenticate a letter from Mass Mutual agent Dan L. Ortego ("Ortego") to Mass Mutual dated July 23, 1997, stating Ortego's belief that Mass Mutual should have continued to pay Plaintiff benefits under the original policy, as well as deVries's attempt to establish an agency relationship between Mass Mutual and

The Clerk of the Court is directed to enter judgment in favor of Mass Mutual.

IT IS SO ORDERED.

Dated: July 12, 1999

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

Ortego. *See id.* at 2; Def.'s Resp. to Pl.'s Sep. Statement of Undisputed Facts at 6; Def.'s Reply at 12.

"To be considered by the court, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence." *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550-51 (9th Cir. 1990) (internal quotation marks omitted). Although deVries states in conclusory fashion that he has "personal knowledge" of facts set forth in his declarations, *see* deVries Decl. filed Feb. 25, 1997, ¶ 1; Reply deVires Decl. filed Apr. 2, 1999, ¶ 1, deVries has not demonstrated that, as Plaintiff's attorney, he was in a position to have personal knowledge as to the relevant events to which he attests nor can such personal knowledge be inferred from the declarations. *Cf. Barthelmy v. Air Line Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990) (stating that the requirement of personal knowledge was established by affiant's statement that he was the office manager and became familiar with the relevant events). Since deVries fails to demonstrate personal knowledge sufficient either to authenticate Ortego's July 23 letter or to establish an agency relationship between Mass Mutual and Ortego, Mass Mutual's motion to stroke deVries' Declarations is granted.

APPENDIX D

[Filed Sep. 16, 1999]

IN TH UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAY SEGAL,

Plaintiff,

v.

MASSACHUSETTS MUTUAL LIFE
INSURANCE COMPANY,

Defendants.

CIV S-98-1264 GEB PAN

ORDER*

Plaintiff moves under Rule 59 (e) of the Federal Rules of Civil Procedure [1] to alter or amend judgment entered July 14, 1999, and under Rule 15 (a) for leave to amend his complaint. Plaintiff also moves under 28 U.S.C. § 1292 (b) and Rule 5 (a) (3) of the Federal Rules of Appellate Procedure for an order certifying a controlling question of law for appeal. Defendant Massachusetts Mutual Life Insurance Company ("Mass Mutual") opposes Plaintiff's motions and moves under Rule 65 to enjoin Plaintiff's further prosecution of a pending state court action arising out of the same facts, transactions, and occurrences as this action.

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* This case was determined to be suitable for decision without oral argument. L.R. 78-230(h).

[1] Unless otherwise noted, all references to the Rules are to the Federal Rules of Civil Procedure.

I.

MOTION TO ALTER OR AMEND THE JUDGMENT AND FOR LEAVE TO AMEND THE COMPLAINT

Plaintiff argues that the July 14 judgment should be altered or amended to allow Plaintiff to amend his dismissed complaint to assert claims for professional negligence, negligent misrepresentation, estoppel, reinstatement and reformation. Mass Mutual argues that Plaintiff's motion to alter or amend the judgment is unsupported, and since the facts giving rise to Plaintiff's proposed new claims "were fully known to plaintiff at the time he originally filed the complaint," Plaintiff's motion to amend his complaint is an impermissible attempt to reassert "old claims cloaked in new legal theories." Def.'s Opp'n Br. to Pl.'s Mot. to Amend at 5 & 6.

Although "a Rule 15(a) motion may be considered only if the judgment is first reopened under Rule 59 or 60," *Lindauer v. Rogers*, 91 F.3d 1355, 1356 (9th Cir. 1996), Plaintiff fails to demonstrate that the judgment should be disturbed. "Under Rule 59(e), the court may reconsider issues previously before it and generally may examine the correctness of the judgment itself," *Ray E. Friedman & Co. v. Jenkins*, 824 F.2d 657, 660 (9th Cir. 1987) (citation omitted), but to obtain relief upon a motion for reconsideration, the moving party must demonstrate (1) the availability of new evidence; (2) the need to correct or clear error or prevent manifest injustice; or (3) an intervening change in controlling law, *see School Dist. No. IJ, Multnoman County v. AcandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

Plaintiff fails to show that previously unavailable evidence, any clear error of law, or an intervening change in controlling law supports altering or amending the Order granting summary judgment for Mass Mutual. Nor has Plaintiff indicated any other reason why the Court should reconsider

the Order. Although Plaintiff now seeks to assert claims he evidently neglected to allege earlier, "[a] party's failure tp present his strongest case in the first instance does not entitle him to a second chance in the form of a motion to amend," *All West Pet Supply Co. v. Hill's Pet Projects Division*, 847 F. Supp. 858, 860 (D. Kan. 1994). Moreover, a Rule 59(e) motion cannot be used to expand the judgment to encompass new issues. *Jenkins*, 824 F.2d at 660. Plaintiff's motion to alter or amend the judgment and for leave to amend his complaint is accordingly DENIED.

II

MOTION FOR CERTIFICATION

Plaintiff also moves under 28 U.S.C. § 1292 (b) to certify for appeal the July 14, 1999, Order. However, " [s]ection 1292 (b) provides a mechanism by which litigants can bring an immediate appeal of a non-final order upon the consent of both the district court and the court of appeals." *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1025-26 (9th Cir. 1982), *aff'd, Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983). Because the July 14, 1999, Order is a final order, in accordance with which judgment was entered in favor of Mass Mutual, section 1292 (b) has no application to this case.

Plaintiff's motion for certification under section 1292 (b) is accordingly DENIED.

III

MOTION TO ENJOIN STATE COURT ACTION

Mass Mutual moves to enjoin Plaintiff's state court action, arguing that it is an attempt to relitigate issues already decided by this Court's July 14 Order. *See* Def.'s Opp'n Br. to Pl.'s Mot. to Amend at 11-12. Plaintiff opposes the motion.

Under the Anti-Injunction Act, 28 U.S.C. § 2283, "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Because the Anti-Injunction Act's "basic purpose is to prevent 'needless friction between state and federal courts,'" *Mitchum v. Foster*, 407 U.S. 225, 233 (1972), exceptions to the Act are to be strictly construed, *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988).

The "relitigation exception" to the Anti-Injunction Act was "designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." *Chick Kam Choo*, 486 U.S. at 146. The Supreme Court described this exception as "strict and narrow" and stated that "an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." *Id.* at 148. In *Western Systems, Inc. v. Ulloa*, 98 F.2d 864 (9th Cir. 1992) , however, the Ninth Circuit extended the relitigation exception to apply to claims that, while not "actually litigated" in federal court, arose from "the same 'transaction' that was litigated in federal court, and are consequently within the bar of res judicate." *Id.* at 871-72.

Mass Mutual argues under *Western Systems* that the relitigation exception bars Plaintiff's state court claims because they arise out of "the identical facts [as the claims in this action] and could easily have been tried together." Def.'s Opp'n tp Pl.'s Mot. to Amend at 12. However, central to the Ninth Circuit's decision in *Western Systems* were "compelling circumstances" that are absent here. Unlike *Western Systems*, this case, which was filed last year, has not been "litigated for seventeen years in the...District Court . . . and [] appealed to [the Ninth] Circuit no less than four times."

Western Systems, 958 F.2d at 871. Nor are the "preclusion issues facing the [state] court issues of federal law" here, as they were in *Western Systems*. *Id.* Rather, in the state court action Mass Mutual seeks to have this Court enjoin, Plaintiff asserts state law causes of action against a non-diverse defendant. Accordingly, Mass Mutual's motion to enjoin Plaintiff's state court action is DENIED.

IT IS SO ORDERED.

Dated: September 15, 1999

/s/ Garland E. Burrell Jr
GARLAND E. BURRELL, JR.
United States District Judge

APPENDIX E

CONSTITUTION OF THE UNITED STATES

ARTICLE III

Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

Section 2. 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and...between citizens of different States;.

5th AMENDMENT

No person shall. . .be deprived of . . . property, without due process of law;

7th AMENDMENT

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

15 United States Code Annotated:

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948(a) State regulation The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.(b) Federal regulation No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the

Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C.A. 41 *et seq.*], shall be applicable to the business of insurance to the extent that such business is not regulated by State law. 28 United States Code Annotated

§ 1254. Courts of appeals; certiorari; certified questions Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.§ 1652. State laws as rules of decision The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Federal Rules of Civil Procedure

Rule 8. General Rules of Pleading(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded. (b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses

to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation. (d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided. (e) Pleading to be Concise and Direct; Consistency.(1) Each averment of a pleading shall be

simple, concise, and direct. No technical forms of pleading or motions are required. (2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be

held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

Rule 15. Amended and Supplemental Pleadings(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the

original pleading when(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings(a) Judgment as a Matter of Law.(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for

that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:(1) if a verdict was returned:(A) allow the judgment to stand,(B) order a new trial, or(C) direct entry of judgment as a matter of law; or(2) if no verdict was returned;(A) order a new trial, or(B) direct entry of judgment as a matter of law.(c) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for

a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment.(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

Rule 56. Summary Judgment(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. (f) When Affidavits are Unavailable. Should it appear from the affidavits of a party

opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. (g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 59. New Trials; Amendment of Judgments (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. (b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment. (c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits. (d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of

judgment the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order. (e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

California Insurance Code:

§ 10320. Required provisions No policy of accident and sickness insurance shall be delivered or issued for delivery to any person in this State unless:(a) The entire money and other considerations therefor are expressed therein; and(b) The time at which the insurance takes effect and terminates is expressed therein; and(c) It purports to insure only one person, except that a policy may insure, originally or by subsequent amendment, upon the application of the head of a family who shall be deemed the policyholder, any two or more eligible members of that family, including husband, wife, dependent children or any children under a specified age which shall not exceed 19 years and any other person dependent upon the policyholder; and(d) The style, arrangement and over-all appearance of the policy give no undue prominence to any portion of the text, and unless every printed portion of the text of the policy and of any endorsements or attached papers is plainly printed in light-faced type of a style in general use, the size of which shall be uniform and not less than 10-point with a lower case unspaced alphabet length not less than 120-point (the "text" shall include all printed matter except the name and address of the insurer, name or title of the policy, the brief description, if any, and captions and subcaptions); and(e) The exceptions and reductions of indemnity are set forth in the

policy and, except those which are set forth in Article 4a or 5a of this chapter, are printed, at the insurer's option, either included with the benefit provision to which they apply, or under an appropriate caption such as "Exceptions," or "Exceptions and Reductions"; provided, that if an exception or reduction specifically applies only to a particular benefit of the policy, a statement of such exception or reduction shall be included with the benefit provision to which it applies; and(f) Each such form, including riders and endorsements, shall be identified by a form number in the lower left-hand corner of the first page thereof; and(g) It contains no provision purporting to make any portion of the charter, rules, constitution, or by-laws of the insurer a part of the policy unless such portion is set forth in full in the policy, except in the case of the incorporation of, or reference to, a statement of rates or classification of risks, or short-rate table filed with the commissioner; and(h) If the policy contains amendment, change, limitation, alteration, or restriction of the printed text by endorsement, or by any means other than rider upon a separate piece of paper made a part of such policy; and(i) If any portion of such policy purports to reduce benefits by reason of age of the insured and such reduction, in accordance with the age of the insured as stated in his application, would be effective on the issue date of the policy.

§ 10321. Amendment of policy after issuance After issuance a disability policy shall not be amended, changed, limited, altered, or restricted by any means other than rider upon a separate piece of paper.

§ 10390. Nonconforming policy provisions A policy delivered or issued for delivery to any person in this State in violation of this chapter shall be held valid but shall be construed as provided in this chapter. When any provision in such a policy is in conflict with any provision of this chapter, the rights, duties and obligations of the insurer, the insured and the beneficiary shall be governed by this chapter. California Rules of Court:

Rule 29.5. Questions of state law certified by federal appellate courts and other courts

(a) [Requirements for certified questions] The California Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, provided that:(1) the certifying court requests the answer;(2) the questions may be determinative of a cause pending in the certifying court; and(3) the decisions of the California appellate courts provide no controlling precedent concerning the certified question.(b) [Contents of certification request] Only a court specified in subdivision (a) may certify a question. The request shall be by an order that sets forth:(1) the caption of the case, including names and addresses of counsel and of parties appearing pro se, and a designation of the party to be deemed the petitioner on the certified question if the request to answer is granted;(2) the questions of law to be answered;(3) a statement (by stipulation of the parties subject to approval by the certifying court, or by the court itself) of all facts relevant to the certified question, and showing fully the nature of the controversy and the circumstances in which the question arose;(4) statements (i) demonstrating that the question certified is contested and that there is no controlling precedent in the case law of the California appellate courts; (ii) explaining how an authoritative answer to the certified question may be determinative of a cause pending in the certifying court; and (iii) indicating that the answer provided by the California Supreme Court will be followed by the certifying court; and(5) such additional information as the certifying court may deem relevant and useful.(c) [Briefs and other materials] The certifying court shall furnish legible copies of all relevant briefs to the California Supreme Court with the request for an answer to the certified question. The California Supreme Court may request that the certifying court furnish additional material, such as exhibits or all or a portion of the record that,

in the opinion of the court, may be useful in answering the certified question.(d) [Request procedure] The judge or justice presiding at the certification hearing (if any)—or the presiding judge or justice of the court or panel certifying the question—shall sign the request for an answer to the certified question. The clerk of the certifying court shall forward the request under its official seal to the California Supreme Court with a certificate that the clerk has served the request on the parties.(e) [Supporting or opposing the request](1) Within 20 days after the request for an answer to a certified question is filed in the California Supreme Court, a party may file a brief supporting or opposing the request.(2) The brief may request that the California Supreme Court restate the certified question under subdivision (g). If a brief makes that request, it shall state a proposed restatement of the question at the beginning of the body of the brief.(3) The brief shall state on its cover whether the brief supports or opposes the request and whether it requests restatement of the question.(4) A party may reply to another party's brief within 10 days after the brief is filed.(5) A brief or reply shall be served on each party and on the requesting court.(f) [Factors that may be considered] The California Supreme Court shall have discretion to accept or deny the request for an answer to the certified question of law. In exercising its discretion the court may consider:(1) factors that it ordinarily considers in deciding whether to grant review of a decision of a California Court of Appeal or to issue an alternative writ or other order in an original matter;(2) comity, and whether answering the question will facilitate the certifying court's functioning or help terminate existing litigation;(3) the extent to which an answer would turn on questions of fact; and(4) any other factors the court may deem appropriate.(g) [Clarification of question] At any time, the California Supreme Court may restate the certified question or may ask the certifying court to restate or clarify the certified question.(h) [Order denying or accepting request] The California Supreme Court shall issue

an order accepting or denying the request for an answer to the certified question. If the court accepts the request, it shall announce that determination in the manner that it announces the acceptance of cases for review, and thereafter:(1) the California Rules of Court for briefing, argument, and conduct of appeals shall govern further proceedings on any certified question unless the court or the Judicial Council otherwise provides;(2) fees and costs shall be the same as in appeals docketed before the California Supreme Court and, in civil matters, shall be equally divided between or among the parties unless the certifying court in its request for an answer to the certified question provides for a different allocation, or the California Supreme Court provides otherwise; and(3) the California Supreme Court may in its discretion assign a certified question such priority on its docket as considerations of fairness, exigency, and comity may require.(i) [Notice to California Attorney General] If the certified question concerns the proper interpretation of a California statute, in litigation in which the State of California or an officer, agency, or employee of the state is not a party, the clerk of the California Supreme Court shall notify the California Attorney General and the California Supreme Court may permit him or her to file briefs on the issue. (j) [Transmission of opinion] The clerk shall forward the California Supreme Court's written opinion stating the law governing the certified question to the certifying court, under the seal of the Supreme Court, and also shall forward copies of the opinion to counsel of record.(k) [Publication and precedential effect] The California Supreme Court's answer to a certified question shall have the same authoritative and precedential force as any other decision of the court, and shall be published in the Official Reports.(l) [Procedural rules] The California Supreme Court or the Judicial Council may adopt procedures governing practice under this rule.

(2)

Supreme Court, U.S.
FILED
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CLERK

No. 01-494

In The

Supreme Court of the United States

JAY SEGAL,

Petitioner,

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, respondent Massachusetts Mutual Life Insurance Company ("MassMutual") identifies the following parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public:

Parent Companies:

None.

Subsidiaries (except wholly-owned subsidiaries):

Oppenheimer Funds, Inc., David L. Babson and Company, Inc., Cornerstone Real Estate Advisers, Inc., MassMutual International Inc., MML Investors, Inc.

Affiliates:

MassMutual is the successor by merger to Connecticut Mutual Life Insurance Company and is the surviving company from that merger.

STATEMENT OF THE CASE

A. Introduction.

None of the questions presented by petitioner are worthy of review on certiorari. Instead, the questions devolve into asking this Court to act as an appellate court to upset decisions of the district court, sitting in diversity, and court of appeals, as to settled issues of state law and discretionary procedural rulings. Petitioner's first question erroneously asserts that by upholding the summary judgment in this state law contract matter, the court of appeals' ruling was inconsistent with Article III of the Constitution, the Fifth Amendment (due process) and the Seventh Amendment (right to jury trial). However, petitioner does not provide any legal analysis to support such contentions, and instead relies only on conclusory references. The transparency of petitioner's constitutional references is self-evident. No constitutional provision has been violated. Petitioner next claims, without basis or justification, that the court of appeals made erroneous factual findings and misapplied California law. There is no compelling basis for review on certiorari on these purported grounds. Petitioner's third question, regarding the decision by the court of appeals to decline a passing suggestion to certify state law issues to the California Supreme Court, does not merit review on certiorari because denial of certification was appropriate and well within the proper exercise of the court's discretion. Petitioner's fourth question involves the request to amend his complaint post-judgment. Again, the request for post-judgment amendment was not only properly denied, but is also not subject to a claim for abuse of discretion.

Because there is no compelling reason to grant the requested writ of certiorari, respondent respectfully submits that the writ be denied.

B. Factual Background.

In April 1992, Massachusetts Mutual Life Insurance Company ("MassMutual") issued a disability insurance policy ("original policy") to petitioner which contained, among other things, a Maximum Benefit Period "to Expiration Date, But Not Less Than 2 Years." The annual premium for the original policy was $2,106.36. Under the original policy and ordinary contract law, petitioner was allowed to apply for changes to the Maximum Benefit Period.

In August 1995, while the original policy was in force, petitioner submitted a claim. MassMutual processed the claim under the original policy which was in force at the time, making periodic benefit payments to petitioner. In November 1995, petitioner reported his complete recovery and the disability insurance benefits were terminated. There is no dispute as to MassMutual's complete performance under the original policy.

In February 1996, petitioner submitted a written application to reduce the Maximum Benefit Period to 2 years. Petitioner also requested that all changes be made effective as of March 21, 1996. MassMutual accepted petitioner's proposed policy changes. In consideration for the policy changes to reduce coverage, petitioner's policy

premiums were reduced to $735.38 per year. The insurance policy ("modified policy") was reissued in writing and memorialized the agreed upon changes.

In June 1996, petitioner asserted that he was again disabled as of May 22, 1996. Thus, according to the modified policy, petitioner's Maximum Benefit Period was two years. After two years of benefits were paid, payments were terminated.

ARGUMENT

The petition should be denied because it fails to demonstrate any compelling reason to grant review. Rules of the Supreme Court of the United States, Rule 10. Petitioner has not satisfied any of the guidelines for review pursuant to Supreme Court Rule 10. Indeed, Rule 10 admonishes petitioner: "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Here, without identifying any compelling reason for extraordinary treatment, petitioner complains only about matters on which this Court rarely grants review.

It is telling that the petition is devoid of any legal analysis regarding petitioner's first question. Contrary to petitioner's bald assertion, the court of appeals' decision to affirm the summary judgment was consistent with Article III of the Constitution, the Fifth Amendment (due process) and the Seventh Amendment (right to jury trial). Petitioner's argument would elevate the grant of every

summary judgment to a constitutional question for this Court to resolve.

Petitioner's second question asserts erroneous factual findings and misapplication of law in connection with granting summary judgment in favor of MassMutual. The assertion is wrong on both counts. Furthermore, Rule 10 suggests the impropriety of asserting such grounds as the basis for review on certiorari. Indeed, this Court generally accords "great deference to the interpretation and application of state law by the courts of appeals." *McMillian v. Monroe County, Ala.*, 520 U.S. 781, 786-787, 117 S.Ct. 1734, 1737 (1997) (citation omitted). Nothing presented by the petition demonstrates any compelling reason to deviate from such deference. In short, petitioner's disappointment with the district court's application of facts to law and the granting of summary judgment in favor of MassMutual, and with the court of appeals' proper affirmance of the summary judgment (as to which *en banc* review was denied), supplies no compelling reason why this Court should review a decision that was based upon settled law.

Petitioner's third question does not merit review on certiorari because certification to the California Supreme Court was both unnecessary and inappropriate. Petitioner has not offered any evidence of abuse of discretion in this regard. California law (including the "process of nature" rule) is well-developed, and the court of appeals correctly recognized that it did not apply in this case. Petitioner's repeated misstatements and misapplications of the process of nature rule and various Insurance Code Sections were properly rejected by the court of appeals. The opportunity to obtain the benefit of the state

Supreme Court's views on issues of state law should be reserved for unsettled issues that would be important to, if not dispositive of, the federal court action. Petitioner seeks to turn this exceptional process into a routine level of additional review available to every disappointed litigant.

Petitioner's fourth question erroneously suggests that he should have been allowed to amend his complaint post-judgment. The request for post-judgment amendment was properly denied because it was nothing more than an effort to reassert old claims cloaked in new legal theories. Nor was there any showing whatsoever that the courts below abused their discretion in rejecting the amendment, since petitioner failed to show the existence of previously-unavailable evidence, clear error of law, or intervening change in controlling law to support his request. Accordingly, there is no compelling reason to review this question on certiorari.

CONCLUSION

For all of the reasons discussed above, respondent respectfully submits that this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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